Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1993

GERALD E. AILOR, et al.,
Petitioners,

-v-

PENSION BENEFIT GUARANTY CORPORATION

and

UNITED STEELWORKER OF AMERICA,
Defendants-Respondants.

On Petition for Writ of Certiorari to
the United States Seventh Circuit
Court of Appeals

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Does a labor union (the United Steelworkers of America, "the Union") represent both (former employee) pension plan participants and "the Plan" in a Chapter 7 bankruptcy proceeding concerning termination of a pension plan without reciprocal duties of fair representation to the persons represented?

2. Is notice of a plan termination proceeding to a union and in the paper sufficient notice to plan participants to bind the plan participants to an agreement, made two years after the participants' employment ceased, by the Pension Benefit Guaranty Corporation ("the PBGC") and the Union to retroactively terminate the pension plan?

3. Can the PBGC use a retroactive termination date, agreed to by the PBGC

and the Union, to divest persons who are vested in pension rights by virtue of twenty years of active service prior to termination to place them in the class of persons with vested pension rights by virtue of having only ten years of active service prior to termination?

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LIST OF PARTIES

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported and unpublished, a copy of which is reproduced in the Appendix hereto at pages 5 to 23.

The opinions of the U.S. District Court for the Southern District of Indiana are reproduced at pages 26 - 36 and 37 - 40 of the Appendix (hereafter referenced as "App. _____.")

JURISDICTION

The opinion of the U.S. Seventh Circuit Court of Appeals was decided on September 30, 1993. App. 5. A judgment was entered on September 30, 1993. App. 3. A timely petition for review was filed by Petitioners Gerald E. Ailor and William E. Burnette and the petition for review was denied on November 16, 1993. App. 1 - 2. The Petitioners herein claim that the petition for review filed by Ailor and Burnette tolls the time within which to file a Petition for Writ of Certiorari from the decision of September 30, 1993 in conformity with Rule 13.4 of the U.S. Supreme Court.

The U.S. Supreme Court has jurisdiction to review the September 30, 1993 opinion of the Seventh Circuit pursuant to 28 U.S.C. §1254.

RULES INVOLVED

CONSTITUTION
OF THE
UNITED STATES OF AMERICA

AMENDMENT 5:

No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 U.S.C. §1342(d)(2)(B):

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this title to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of the paragraph, the term "interested party" means - ...

(B) each participant in the plan and each beneficiary of a deceased participant, and

29 U.S.C. §1322 (a):

(a) Subject to the limitations contained in subsection (b), the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonfortfeitable solely on account of the termination of a plan) under the terms of the plan which terminates at a time when section 4021 [29 USCS §1321] applies to it.

STATEMENT OF THE CASE

This is an appeal from the final agency decision of the Pension Benefit Guaranty Corporation ("the PBGC") denying Gerald E. Ailor and the other Petitioners (hereafter, "the Plan Participants") guaranteed early retirement benefits.

Each Plan Participant had twenty years or more of active continuous service credit in Pension Plan "A" of Continental Steel Corporation prior to the shutdown of the factory on February 25, 1986. App. 19 - 23. Having twenty years of service vested the Plan Participants in rights to early retirement benefits pursuant to terms of the Pension Plan. Id.

In 1988, there was an agreement between the PBGC and the United Steelworkers of America ("the Union") who represented the Plan [App. 51], and who represented, and still represents the Plan Participants as their exclusive bargaining agent in the Chapter 7 bankruptcy proceedings of

Continental Steel Corp. App. 17. The agreement in 1988 retroactively established the termination date of the Pension Plan as February 25, 1986.[1] Id.

The Plan Participants were not parties to the negotiations leading to the settlement agreement or to the bankruptcy proceedings as the Union was the Plan Participants exclusive representative. Id.

The Plan Participants sought judicial review of the denial of the "Rule-of-65" early retirement benefit under §2.7 of

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[1] A partially executed settlement agreement is presently filed as public record in the bankruptcy proceeding of Continental Steel as attached to a document captioned on the docket:

2/5/88 Trustee files Application for Authority to Enter Into Settlement Agreement Related to Pension Plan Litigation.

The document is file stamped 2/5/88. There is the signature of counsel: For United Steelworkers of America, AFL-CIO-CLC, on behalf of itself and on behalf of members and former retired members of Union Locals 2, 1054 and 3601 executed on 2/8/88 and executed by the bankruptcy trustee on 2/22/88.

the Pension Plan which provides that a participant must (1) have at least twenty years of continuous service as of the last day worked; (2) have not attained the age of fifty-five years; and (3) have a combined age and years of continuous service of at least sixty-five and not more than eighty. Continental Pension Plan A, §2.7. App. 19.

The Plan Participants met the first two conditions, but did not have the combined age and years of continuous service equaling 65 prior to the termination date of 2/25/86 agreed to by the PBGC and the Union. Id.

The Plan Participants included the Union in its original complaint in the District Court since the Union was, and still is, the exclusive bargaining agent for the Plan Participant as recognized by the bankruptcy court. The Plan Participants are represented and recognized there as members of the Union.

App. 43 - 44. There was no allegation of wrongdoing by the Union but simply the allegation that the Union was the exclusive bargaining agent and a "necessary party" to the action. Id.

The District Court found that there was no equitable remedy to enforce the collective bargaining duties of the Union. App. 44 - 49. The District Court determined that the agreement on the plan termination date occurred in 1988, and that any action for breach of duty of fair representation by the Union had long since passed with the six-month statute of limitations. App. 46.

The Plan Participants proposed an amended complaint alleging a breach of fair representation by the Union. App. 37 - 40. The Plan Participants alleged that the Union represented William E. Collins, who as President of the Union's Local 1054 from 1979 to 1986, was a plan participant of Pension Plan A.

The PBGC determined that William E. Collins had a right to a guaranteed "Rule-of-65" early retirement pension in 1986. The Plan Participants alleged invidious discriminatory treatment of its members by the Union. The District Court determined that this added nothing to the original complaint, and the Plan Participants did not articulate a breach of duty of fair representation by the Union. App. 37 - 40.

As to the use of the termination date of 2/25/86 agreed to by the PBGC and the Union as res judicata and binding on Plan Participants as members of the Union. [App. 17.] The Plan Participants have consistently asserted that the Union has no business being here when there is no longer an employer, employees, or collective bargaining, and there is simply retirees like the Plan Participants with no expectation of returning to work or the Union hall.[2]

This has consistently been the position of the National Labor Relations Board ("NLRB") when the Plan Participants file an unfair labor practice grievance with the NLRB. App. 52 - 53.[3]

The federal courts have consistently determined that the Union is the exclusive bargaining agent who represents Plan Participants and their interests in pensions. App. 6. In Re Continental Steel Corp., 968 F.2d 1218 (7th Cir.-1992) cert. denied 113 S.Ct. 605 (1992).

The second objection of the Plan Participants to the use of the termination date of 2/25/86, is the fact that the bankruptcy court appointed PBGC as statutory trustee of Pension Plan A in

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[2] Plan Participants were locked out of their Union hall in August, 1986.

[3] A copy of the letter of the NLRB to Phillip Kauble dated 10/23/93 as reproduced in the Appendix has been provided to the Clerk.

March, 1986, and there has yet to be notice given to Plan Participants of proceedings to terminate the Plan as required by the plain meaning of 29 U.S.C. §1342(d)(2)(B). See, App. 8; App. 35 at footnote 4.

The Plan Participants assert that there has not been actual notice given to Plan Participants of any proceeding or negotiations of their interests that comports with the due process requirement set forth in Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652 94 L.Ed 865 (1950). Id. Thus, the binding of the Plan Participants to the Plan termination date agreed to by the PBGC and the Union does not comport with the due process requirements of the Fifth Amendment.

Finally, the Plan Participants asserted that, assuming, arguendo, that the termination date agreed to by the PBGC and the Union is binding on participants, the Plan Participants "vested in the

accrued benefits of employees with significant periods of service", in this case, 20 years of service prior to the agreed termination date. 29 U.S.C. §1001 (e).

The Plan Participants assert that the arbitrary act of the PBGC, without rational basis, disenfranchised the Plan Participants from vested benefits from 20 years of service, and placed them in the class of Plan Participants vested with rights with only ten (10) years of service.

REASONS WHY THIS PETITION FOR CERTIORARI SHOULD BE GRANTED

This petition demonstrates substantial departures from the laws of the United States sanctioned by the Seventh Circuit Court of Appeals.

This petition demonstrates that there is a substantial question raised concerning the recognition of bargaining units and labor organizations in a

Chapter 7 bankruptcy proceeding to represent its "members" when there is no longer any employer or employees, and there is simply retirees with no expectation of return to work. This petition demonstrates that there is no remedy for Plan Participants in the event of breach of duty of fair representation by the Union who represents them as their exclusive bargaining agent.

This petition demonstrates that there is a substantial departure from the plain meaning of the law, 29 U.S.C. §1342(d)(2)(B), in the failure of the PBGC to give notice to Plan Participants of proceedings to terminate the Plan. This petition demonstrates that there is a substantial departure from the actual notice required by the Fifth Amendment as articulated in Mullane v. Central Hanover Bank, supra., prior to the use of prior proceedings affecting the rights and interests of Plan Participants as binding

on them.

Furthermore, this petition demonstrates the arbitrary and capricious acts of the PBGC in divesting the Plan Participants, who were vested in accrued benefits by virtue of 20 years of service prior to the Plan termination date agreed to by the PBGC and the Union, and in placing the Plan Participants in the class of persons with only 10 years of service.

I.

THE PLAN PARTICIPANTS HAVE NO REMEDY FOR INVIDIOUS DISCRIMINATORY TREATMENT BY THEIR EXCLUSIVE BARGAINING AGENT

Allied Chemical v. Pittsburgh Plate Glass, 404 U.S. 157, 172, 92 S.Ct. 383, 30 L.Ed.2d 341, 353 (1971) provides:

> [13] In this cause, in addition to holding that pensioners are not "employees" within the meaning of the collective-bargaining obligations of the Act, we hold that they were not and could not be "employees" included in the bargaining unit. The unit determined by the Board to be appropriate was composed of "employees of the Employer's plant ... working on hourly rates,

> including group leaders who work on hourly rates of pay ...." Apart from whether retirees could be considered "employees" within this language, they obviously were not employees "working" or "who work" on hourly rates of pay. Although those terms may include persons on temporary or limited absences from work, such as employees on military duty, it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

The Plan Participants have exhausted their judicial remedies in asserting that the Union has no business being here in that as of 2/25/86 there is no more employer, no more employees, no more Union meetings, and that there are just "retirees", like Plan Participants, with no expectation of return to work. Allied Chemical, supra. The National Labor Relations Board agrees. App. 52 - 53.

Nevertheless, the federal courts have recognized and certified the appropriate bargaining units where the Union is now representing the rights and interests of Plan Participants in a Chapter 7

bankruptcy proceeding as their exclusive bargaining agent. App. 6; App. 8 at footnote [1]. 968 F.2d 1218, cert. denied 113 S.Ct. 605.

The Plan Participants alleged in their complaint that they "are members of the Union." App. 43. This is legal science fiction pursuant to judicial determinations. Id. This was an equitable action of our federal courts to enforce the Union's duty to represent Plan Participants as their "exclusive bargaining agent." App. 44. The allegations in the Plan Participants' complaint are undisputed and assumed to be true. Conley v. Gibson, 355 U.S. 41 (1957). However, the District Court found no equitable cause of action to enforce the Union's duty of fair representation. Id. There has been no attempt by the lower federal courts to clarify the rights and duties of the bargaining agency and its members.

Appendix, passim.

The Plan Participants proposed an amended complaint alleging invidious discrimination by the Union. The Union represents Union officials, as the representative of the Plan, [App. 50 - 51,][4] so that Union officials by virtue of significant periods of service to the Union, get guaranteed pensions from the PBGC, while Plan Participants who have vested benefits prior to Plan termination pursuant to terms of the Plan, get nothing.

A union's duty of fair representation can be breached by discriminatory inaction in refusing to process a grievance as well as by active conduct on part of a union. Local Union No. 12,

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[4] A copy of the letter of Carol Conner Flowe, counsel for the PBGC to Phil Kauble dated 8/17/93 has been provided to the Clerk of the Supreme Court for inspection.

United Rubber C., L.& P. Workers v. NLRB, 368 F.2d 12, 17-18 (5th Cir.-1966).

The PBGC and Union have asserted the rule articulated in Toensing v. Brown, 528 F.2d 69, 70 (9th Cir.-1975);

> The collective bargaining parties acted properly in recommending varying benefit increases for active and retired carpenters. Retirement benefits for active employees are a mandatory subject for collective bargaining. Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). The union is not required to negotiate additional benefits for retirees, but it may do so. 404 U.S. at 171 n. 11 and 181 n. 20, 92 S.Ct. 383. If the union does undertake to represent retirees, its duty of fair representation requires that their vested retirement rights not be disturbed:
>
> "This does not mean that when a union bargains for retirees -- which nothing in this opinion precludes if the employer agrees -- the retirees are without protection."

citing Allied Chemical at 404 U.S. 181 footnote 20.

Here, the retirees are without protection. They have no judicial remedy to enforce the Union's duty of fair representation, and they have no

administrative remedy within the NLRB to enforce the unions duty to represent fairly all members. App. 52 - 53.[5]

The rule in Toensing makes sense when there is an active bargaining unit of employees who is collective bargaining with an employer. However, the extension of "collective bargaining" to a Chapter 7 bankruptcy proceeding where there is no employer or a bargaining unit of active employees, leaves the Plan Participants without a remedy. Because of the numerous persons situated like Plan Participants where plans are terminated upon Chapter 7 bankruptcy proceedings, this means that most plan participants whose plans are

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[5] If a grievance would have been processed but for arbitrary and discriminatory reasons, union's refusal to so process the grievance constitutes a violation of the union's duty to represent its members without hostile discrimination, fairly, impartially and in good faith and constitutes an unfair labor practice. Local Union No. 12, United Rubber, supra, 368 F.2d at 18-19.

terminated are without any administrative or judicial remedy in the event of outrageous conduct by the PBGC and the participants "bargaining agent."

II.

THERE HAS BEEN NO NOTICE TO THE PLAN PARTICIPANTS THAT COMPORTS WITH PLAIN STATUTORY LAW AND THE REQUIREMENTS OF DUE PROCESS THAT THEIR INTERESTS WERE BEING DETERMINED BY THE AGREED PLAN TERMINATION DATE

29 U.S.C. §1342(d)(2)(B):

> (2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this title to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means -- ...
> (B) each participants in the plan and each beneficiary of a deceased participant, and

On March 12, 1986, the PBGC was appointed statutory trustee of Pension Plan "A". App. 28. At no time did the PBGC move a muscle after March 12, 1986, to give Plan Participants notice of institution of proceedings to terminate

the Plan as required by law to do so. 29 U.S.C. §1342(d)(2)(B).

The PBGC published a Notice of Determination in two local newspapers on February 17 and 18, 1986, stating that the PBGC intended to apply for an order in a federal court appointing it the statutory trustee. App. 7-8. There was no notice of any proceeding in any particular federal judicial district. Id.

The District Court stated at App. 35 at footnote 4:

> Indeed, PBGC notes in its briefs that Continental and the Union received notice, and that notice was published in the Indianapolis and Kokomo papers. While the plaintiffs may not be happy with their Union's representation, the plaintiffs are wise to consult Rule 11, Fed.R.Civ.Pro., prior to making any allegations that they did not receive notice of the termination of Plan A.

The Plan Participants have consulted Rule 11 Fed.R.Civ.Pro. For the record, they are still real unhappy at the failure of the PBGC to give them notice

of proceedings upon appointment as trustee, when required by the plain meaning of the law to do so. 29 U.S.C. §1342(d)(2)(B). This substantial departure from the law means that all plan participants of terminated plans may have their rights and interests litigated without any notice of proceedings, contrary to the express intent of Congress.

Then there is the common law requirements of due process guaranteed by the Fifth Amendment as articulated in Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed 865 (1950). Mullane is a case in point. In Mullane, there was a trustee for beneficiaries of a terminated trust; here, there is a bargaining agent with fiduciary duties[6] who bargains away the rights and interests of beneficiaries to a trust for other considerations without notice to beneficiaries. That is because

beneficiaries would embarrassingly assert their rights and interests if given notice of proceedings affecting their interests.

The use of the Plan termination date agreed to by the PBGC and the Union when Plan Participants had no notice of the proceedings and were not parties to the proceedings [App. 17] is in violation of due process. Mullane, supra. Here, the federal courts recognized and certified an exclusive bargaining agent for Plan Participants without a whiff of authority in the laws of the United States, and called it a "privy" to Plan Participants. App. 17-18.

This substantial departure from the law is the cornerstone of American

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[6] The Union represented the Plan, and participated in its administration, as an ERISA fiduciary, by virtue of a Union appointee to Continental's Board of Directors. App. 50 - 51.

jurisprudence. Once a federal judiciary can freely create entities without authority in law to separate persons from their rights and interests, the constitutional guaranty that persons shall not be deprived of property without due process of law means nothing. The volume of law devoted to defining "standing" to maintain an action are a fraud and a sham, and a person has no standing to adjudicate his rights and interests. In Re: Dread Scott, _____ U.S. _____. (1856).

III.

ASSUMING THE PLAN TERMINATION DATE AGREED TO BY THE PBGC AND THE UNION, IS BINDING, THE PLAN PARTICIPANTS ARE BEING DISENFRANCHISED OF VESTED RIGHTS ACCRUED BY SIGNIFICANT PERIODS OF SERVICE PRIOR TO THE PLAN TERMINATION DATE

There is no dispute that the Plan Participants had accrued twenty years of service prior to the Plan termination date of 2/25/86 as agreed to by the PBGC

and the Union. App. 19-20. This vested the accrued benefits of Plan Participants by virtue of a significant period of service, twenty years. 29 U.S.C. §1001 (c).

The right to accrue age and seniority, commonly called "creeping", after layoff or plant shutdown, was first incorporated into Continental's Pension Plan A in 1977. And although Continental went through a prior Chapter 11, in 1980, the Plan remained unscathed.

Given the passage of time, and notice of Continental's possible failure by the 1980 Chapter 11 petition, without the Plan Participants receiving accurate and comprehensive information concerning a modification of their right to "creep" affirms the Plan Participants had substantial reliance in the contractual promise that they would be allowed to accrue whatever requisite necessary after layoff to qualify for the Rule-of-65

retirement benefit. 29 U.S.C. §1022. Terones v. Pacific States Steel Corp., D.C. Cal. 1981, 526 F.Supp. 1350.

Appendix A of Pension Plan, in pertinent part:

> Through the Employment and Income Security Program, the parties specifically provide that employees who have at least 20 years of continuous service as of their last day worked and who are laid off and are not placed in suitable long-term jobs may receive additional income protection in the form of extended SUB and insurance benefits. The parties also provide that employees who have at least 20 years of continuous service as of their last day worked and who are disabled may receive additional insurance protection in the form of extended S&A and insurance benefits. In addition, the parties provide eligible employees who are not offered suitable long-term employment with a pension under rule-of-65 retirement plus a monthly supplement.

These are plain words with plain meaning. However, the PBGC's position is that the Plan Participants had not met the age plus service equaling 65 prior to the termination date, thus they will

never be eligible for a Rule-of-65 pension, contrary to the express language of Appendix A of the Pension Plan.

It is the position of the Plan Participants that they may not be able to accrue additional service benefits after the Plan termination date, however, they are entitled to accrue additional age component after the Plan termination date, so that when their service prior to termination date plus their age does equal 65, they are eligible for a Rule-of-65 pension. This principle is confirmed by the fact that each Plan Participant will receive a Deferred Vested Pension at normal retirement age of sixty-five. App. 22-23. Why?

That answer is that they meet an age requirement that accrues <u>after</u> the Plan termination date. If the logic of the PBGC in denial of Rule-of-65 pensions of Plan Participants is consistent, <u>i.e.</u>,

since they were not eligible for pensions prior to Plan termination date, they will never be eligible, then the Plan Participants can take little comfort in the idea that they may be eligible for Deferred Vested Pensions at age sixty-five, since they were not sixty-five prior to the Plan termination date. See, App. 22-23.

The PBGC admits that persons who were older with less service time got Rule-of-65 pensions. PBGC Brief before the Seventh Circuit at 19. This points to the irrationality of the PBGC's position. There is little or no additional liability to the PBGC insurance fund or to the Treasury in granting Plan Participants their Rule-of-65 pensions since the amount of retirement benefit is actuarially calculated from a fixed annuity and benefits accumulated to be equal at no matter what age of

retirement.

In other words, if Plan Participants are eligible for a Rule-of-65 pension now for $400.00 per month, it is because they are forebearing from a larger pension per month at age sixty-five.

The principle purpose of ERISA [29 U.S.C. §§1001, et seq.] was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by termination of pension plans before sufficient funds have been accumulated in the plans, so as to guarantee that workers who have been promised defined pension benefits upon retirement and has fulfilled whatever conditions are required to obtain vested benefits, will actually receive it. PBGC v. Grey & Co., 467 U.S. 717, 727-731, 81 L.Ed.2d 601, 104 S.Ct. 2709 (1984). The Plan Participants were promised defined pension benefits upon shutdown of

Continental Steel and had fulfilled conditions required by virtue of twenty years or more of active service. Appendix "A" of Pension Plan, supra.

Among the principle purposes of this "comprehensive and reticulated statute" was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans. Nachman Corp. v. PBGC, 446 U.S. 359, 361-362, 374-375, 64 L.Ed.2d 354, 100 S.Ct. 1723 (1980).

The Plan Participants do not object to the notion that the Plan must be terminated. However, they do object to the manner in which PBGC sought to accomplish this retroactively with their former bargaining agent in proceedings they got no notice of and were not parties to. App. 17.

The Plan Participants would not be here

now had they been included in the proceeding, had they been advised that the Plan had been modified to exclude the "creep" provision or had the Plan been funded in accordance to the documents and instruments controlling Plan funding requirements.[7]

Given the fact that the Plan was retroactively terminated from 1988 to 2/25/86 in proceedings with their former Union, while they got no notice of and were excluded from the proceedings, the Plan Participants' rights to remedy remained within the scope of administrative appeal of PBGC initial determinations and the courts. Thus, the Plan Participants are complying with the rules when given the opportunity to do so.

It would have been premature and wrong

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[7] A labor dispute in 1971 over the funding of Pension Plan A contractually "guaranteed" that the Plan would be fully funded on a sound actuarial basis.

for the Plan Participants to seek remedy before, because the matter had not been decided. Likewise, it would have been premature and wrong to file a charge against the Union on mere speculation and guesswork. Thus, such a charge was not warranted until after PBGC issued initial determinations concerning the effect of termination on the Plan Participants' right to benefits.

Phil Kauble filed timely charge. App. 52 - 53. And in its dismissal, NLRB made clear that the Union's representation of the Plan Participants in 1988 is not the type normally discussed in the LMRA. However, that did not deter PBGC from imposing a settlement made with the Union upon the Plan Participants that PBGC did not make with the Union until two years after the Plan Participants' employment and membership in the Union terminated, the Union's "obligation" of

fair representation under labor law ceased and the effect of which remained subject to the issuance of initial determinations and administrative appeals.

The Plan Participants were deprived of anticipated retirement benefits by the termination of their pension plan.

The denial of "Rule-of-65" pension benefits to Plan Participants is contrary to Nachman and Grey. The law provides that PBGC shall guarantee benefits vested by a significant period of service. 29 U.S.C. §1322.

This substantial departure from the law means that the PBGC, when it terminates a plan, is free to disenfranchise plan participants who have vested pension benefits from substantial periods of service by the plain language of the plan. The net result here is that the thirteen Plan Participants herein were arbitrarily disenfranchised from a class

of 300 persons with twenty or more years of service who received early retirement benefits and placed in the class of persons with ten or more years of service.

CONCLUSION

For the foregoing reasons, this Petition has demonstrated substantial departures from the laws of the United States, far departures from the usual and accepted course of proceedings, and important question of gravity and general importance warranting the discretionary supervisory authority of this court. Fields v. United States, 205 U.S. 292, 51 L.Ed 807, 27 S.Ct. 543 (1907).

PRECISE RELIEF REQUESTED

For the foregoing reasons, Plan Participants pray that petition for writ of certiorari shall issue and an opinion by the court (1) that an exclusive bargaining agent cannot represent their

principals without a reciprocal duty of fair representation, (2) that actual notice of proceedings affecting the rights and interests of Plan Participants must be given before the adjudications of the proceedings can be binding on Plan Participants consistent with 29 U.S.C. §1342(d)(2)(B) and Mullane, supra, (3) that the Plan Participants cannot be disenfranchised of rights vested by twenty years of service prior to Plan termination as a result of Plan termination, and (4) such other and further relief as proper in the premises.

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App. 1

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 16, 1993

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Garnett Thomas Eisele,
Chief District Judge*

GERALD E. AILOR, WILLIAM E. BURNETTE, GARY P. BYERS, et al., Plaintiffs-Appellants,	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division.
No. 92-4012	
v.	No.91 C 404
PENSION BENEFIT GUARANTY CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, Defendants-Appellees.	S. Hugh Dillin, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Plaintiffs-Appellants Gerald E.

Ailor and William E. Burnette, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Hon. Garnett Thomas Eisele, Chief Judge for the Eastern District of Arkansas, is sitting by designation.

App. 3

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

September 30, 1993

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Garnett Thomas Eisele,
Chief District Judge*

No. 92-4012

GERALD E. AILOR, WILLIAM E. BURNETTE, GARY P. BYERS, et al.,
Plaintiffs-Appellants

v.

PENSION BENEFIT GUARANTY CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis, Division No. 91 C 404, S. Hugh Dillin, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

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* The Honorable Garnett Thomas Eisele, Chief District Judge for the Eastern District of Arkansas, is sitting by designation.

App. 5

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 30, 1993

Decided September 30, 1993

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Garnett Thomas Eisele,
Chief District Judge*

GERALD E. AILOR, WILLIAM E. BURNETTE, GARY P. BYERS, et al., Plaintiffs-Appellants,	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 90-4012	)
v.	)
PENSION BENEFIT GUARANTY CORPORATION and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, Defendants-Appellees.	) No. 91 C 404 S. Hugh Dillin, Judge

ORDER

Gerald E. Ailor and twelve others ("plaintiffs") are former employees of Continental Steel Corporation

("Continental"). They sued the United Steelworkers of America ("Union") and the Pension Benefit Guaranty Corporation ("PBGC") to obtain benefits under Continental's Pension Plan A, in which the plaintiffs participated. The district court granted both the Union's motion to dismiss and the PBGC's motion for summary judgment. The plaintiffs moved the court for leave to file an amended complaint, which the court denied. The plaintiffs appeal and we affirm.

I. Background

To put this lawsuit into context, we draw mainly from the facts that appear in In re Continental Steel Corp. 968 F.2d 1218 (7th Cir.)(Table). cert. denied. 113 S.Ct. 605 (1992). an unpublished order

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* Hon. Garnet Thomas Eisele, Chief District Judge for the Eastern District of Arkansas, is sitting by designation.

we issued in a related appeal.

The plaintiffs are former employees of Continental, which went bankrupt, and they participated in Continental's 1950 Employee Pension Plan A ("Plan A"). The PBGC is a wholly owned corporation of the United States that administers and enforces the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act ("ERISA").

In early February 1986, the PBGC issued a Notice of Determination to Continental (the administrator of Plan A) and the Union (the plaintiffs' bargaining representative). The Notice stated that PBGC had determined that Plan A was underfunded and that it should be terminated because the potential loss to the PBGC would be excessively high. The Notice also stated that the PBGC should

be appointed the statutory trustee of Plan A to prevent any unreasonable deterioration of the financial condition of the Plan. The Notice further stated that the PBGC intended to apply for an order in a federal district court appointing it the statutory trustee and setting February 14, 1986, as the termination date of the Plan.

The PBGC then filed its application to terminate Plan A in a district court. To notify the Plan A participants, including the plaintiffs, a copy of the Notice of Determination was published in two major, local newspapers on February 17 and 18, 1986. The district court referred the matter to the bankruptcy court. The Union was permitted to intervene.[1] The Union

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[1] As explained in In re Continental Steel Corp., 968 F.2d 1218 (7th Cir.)(Table), cert. denied. 113 S.Ct. 605 (1992). the plaintiffs, and other Plan A participants, were denied the right to intervene.

objected both to the PBGC's application to terminate Plan A and to its proposed Plan termination date of February 14, 1986. The Union asserted that it continued to be the "official bargaining agent for the employees who have rights in and are beneficiaries of [the Plan]."

After converting Continental's bankruptcy from a Chapter 11 to a Chapter 7 proceeding, the bankruptcy court approved the termination of Plan A and appointed the PBGC as statutory trustee. The bankruptcy court did not resolve the termination date of Plan A, however. Thus, the Union, the PBGC, and the bankruptcy trustee began negotiating the termination date. Two years later, in February 1988, the three entered into a settlement agreement setting February 25, 1986, as the termination date of Plan A. In March 1988, the bankruptcy court

approved the settlement agreement. The plaintiffs appealed the ruling to this court, but lost because they failed to file a timely appeal.

The plaintiffs then requested a "Rule-of-65 Retirement" pension from the PBGC to receive their pension benefits early. For an employee to qualify for a "Rule-of-65 Retirement" pension, Plan A requires the employee to have at least twenty years of continuous service as of his last day worked, not yet be fifty-five years old, and have a combined age and years of continuous service that is at least sixty-five and not more than eighty. The PBGC denied the request, because, although the plaintiffs had the necessary twenty years of continuous service, they failed to meet the age requirement.

In April 1991, the plaintiffs filed

this lawsuit seeking pension benefits from the PBGC pursuant to the "Rule-of-65 Retirement" provision. They also claim that the Union had breached its duty of fair representation in failing to enforce the collective bargaining agreement in 1988. The district court granted both the Union's motion to dismiss and the PBGC's motion for summary judgment. The plaintiffs moved the court for leave to file an amended complaint, but the court denied that motion, and this appeal followed.

II. Analysis

We have jurisdiction, 28 U.S.C. §1291, to consider the various contentions the plaintiffs make on appeal. At the outset, we note the plaintiffs' arguments lack focus and have no merit. We will, therefore, discuss only a few of them. As in the past, we again state our dissatisfaction with the performance of

the plaintiffs' attorney, Mark Garringer, in his presentation of his clients' claims on appeal.[2]

A. Motion to Dismiss

The plaintiffs challenge the district court's ruling on the Union's motion to dismiss. We review a district court's ruling on a motion to dismiss de novo, assuming the truth of all well-pleaded factual allegations and making all possible inferences therefrom in favor of

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[2] In a recent unpublished order, Wade v. Hopper, No. 91-3892 (7th Cir. June 17, 1993), we outlined Mark Garringer's history of being sanctioned by this court for bringing frivolous appeals. Those monetary sanctions did not deter Mr. Garringer from continuing his inappropriate behavior, however, as demonstrated by his disrespectful conduct in Wade. We were led, therefore, in Wade to take the following actions:

> it is ORDERED that Mark Garringer's name be stricken from the roll of attorneys admitted to practivce before this court and we direct the Clerk to send copies of this order to the Disciplinary Commission of the Supreme Court of Indiana.

the plaintiff. Harriston v. Chicago Tribune Co., 992 F.2d 697, 701 (7th Cir. 1993). We will not affirm the grant of a motion to dismiss unless we are convinced that the plaintiffs can prove no set of facts to support his claim for relief. Id.

In granting the Union's motion to dismiss, the district court stated its frustration in attempting to isolate exactly what the plaintiffs were attempting to achieve in their lawsiuit. We empathize with the district court's frustration and concur with the court that the plaintiffs appeared to have raised a claim against the Union for breach of fair representation. We also agree with the district court that the plaintiffs are time barred from bringing such a claim. A six-month limitations period governs bringing a claim for

breach of fair representation. DelCostelo v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983); Johnson v. Graphic Communications Int'l Union, 930 F.2d 1178, 1182-83 (7th Cir.) cert. denied, 112 S.Ct. 184 (1991). The breach of fair representation the Union allegedly made was in 1988. The plaintiffs did not bring their lawsuit against the Union, however, until 1991, which is well outside the six month limitations period, and the plaintiffs have not advanced any tolling arguments.

We further agree with the district court that any claim the plaintiffs attempted to make under ERISA fails because they did not set forth sufficient facts to show what terms of Plan A the Union allegedly violated. The Union did not administer Plan A - Continental did - and nothing in the complaint links the

Union with any wrongdoing regarding the administration of the Plan.

The plaintiffs, moreover, contend that the district court erred in not granting them leave to file an amended complaint. We disagree. The claims in the amended complaint are essentially the same as the ones raised in the initial complaint, with the main difference being a claim that the Union breached its duty of fair representation to the plaintiffs by moving to dismiss the lawsuit the plaintiffs had brought against it. (The Union's motion to dismiss was filed fewer than six months before the plaintiffs sought to file their amended complaint.)

The plaintiffs' claim is without merit. Although the alleged breach by the Union occurred within the six month statutory period, to breach the duty of fair representation the Union needed to act in

an arbitrary, discriminatory or bad faith manner. E.g., Souter v. International Union, 993 F.2d, 595, 598 (7th Cir. 1993). In defending itself against the plaintiffs' lawsuit, the Union did not breach its duty of fair representation. The Union was free to challenge the claims the plaintiffs brought against it. If we are to follow the plaintiffs' line of logic, any time an employee sued its representative union, the union would have to relent and accept defeat once the complaint were filed. Thus, we conclude that the district court did not err in denying the filing of the amended complaint; from what the plaintiffs pleaded in their proposed amended complaint, the plaintiffs could prove no set of facts to support their claim for relief. Harriston, 992 F.2d at 701.

The plaintiffs also contend that the

settlement agreement, which set the termination date of Plan A as February 25, 1986, and which the bankruptcy court approved, cannot be used against them becaiuse they were not parties to its making. Although the plaintiffs are correct that they were not parties either to the negotiations leading to the settlement agreement or to the bankruptcy proceedings, the Union was a party and the Union was the plaintiffs' exclusive representative. See Johnson, 930 F.2d at 1181. It follows, then, that the terms of the settlement agreement bind the plaintiffs. See In re Continental Steel Corp., 968 F.2d 1218 (7th Cir.) (Table), cert. denied, 113 S.Ct. 605 (1992); see also Gray v. Lacke, 885 F.2d 399, 404 (7th Cir. 1989) ("Under the doctrine of res judicata (claim preclusion), a final judgment on the merits of an action bars

further claims by the parties or their privies based on the same action.") (emphasis added), cert. denied, 494 U.S. 1029 (1990).

B. Motion for Summary Judgment

The plaintiffs challenge the district court's ruling on the PBGC's motion for summary judgment. "We review de novo a district court's order granting summary judgment, viewing the facts and drawing all reasonable inferences therefrom in favor of the nonmoving party." Brookins v. Kolb, 990 F.2d 308, 312 (7th Cir. 1993). "Summary judgment is authorized 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Federal

Rule of Civil Procedure 56(c)). "Summary judgment is appropriate only in circumstances where 'the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

To be eligible for a "Rule-of-65 Retirement" benefit, each of the plaintiffs needed to meet the following criteria before Plan A termination on February 25, 1986: (1) have at least twenty years of continuous service as of his last day worked; (2) have not attained the age of fifty-five years; and (3) have a combined age and years of continuous service of at least sixty-five and not more than eighty. Continental Pension Plan A, § 2.7.

The plaintiffs assert that they each had twenty or more years of continuous

service with Continental. That may be true, but they have not shown that they met the age requirement to qualify for the "Rule-of-65 Retirement" benefit. That is the problem here. When Plan A terminated on February 25, 1986, the plaintiffs had yet to satisfy the conditions required of them to establish a "nonforfeitable" right to a "Rule-of-65 Retirement" benefit. 29 U.S.C. §1301(a)(8); 29 C.F.R. §2613.6(a). To overcome that difficulty, the plaintiffs appear to want us to disregard the date of February 26, 1986, as the termination date of Plan A. Unfortunately for the plaintiffs, we cannot ignore the termination date stated in the settlement agreement, which the bankruptcy court approved. The PBGC is only able to guarantee the amount of benefits that have vested at the time a benefit plan terminates. 29 C.F.R.

§2613.3; see In re Pension Plan for Employees of Broadway Maintenance Corp., 707 F.2d 647, 649 (2d Cir. 1983); Hackett v. Pension Benefit Guar. Corp., 486 F.Supp. 1357, 1366 (D.Md 1980).

February 25, 1986, was the cut-off date for the plaintiffs to have satisfied the necessary conditions to obtain a "Rule-of-65 Retirement" pension benefit. After that date, the plaintiffs were unable to obtain a "nonforfeitable right" to such a benefit. 29 C.F.R. §§2605.5(a)(3), 2613.6 (a); Mead Corp. v. Tilley, 490 U.S. 714, 725 (1989) ("The PBGC has consistently maintained that, for purposes of its guarantss ... the characterization of benefits as forfeitable or nonforfeitable depends upon their status before plan termination.") After the February 25, 1986, termination of Plan A, the PBGC had no legal or other obligation to pay

benefits to Continental employees who had yet to become eligible for the "Rule-of-65 pension benefit. See 29 C.F.R. §§ 2613.3, 2613.5(a), 2613.6(a); Hackett, 486 F.Supp. at 1366.

Despite not qualifying for the "Rule-of-65 Retirement" pension benefit, the plaintiffs are not without some form of a pension. According to the PBGC, the plaintiffs are entitled to a Deferred Vested Pension. Under the Deferred Vested Pension, each plaintiff will receive his pension benefits when he reaches age sixty-five. If any plaintiff chooses to receive his retirement benefits before attaining age sixty-five, his monthly benefit amount will be actuarially reduced until he reaches age sixty-two, at which time he will receive the full amount of his guaranteed monthly benefit.

In closing, we reiterate a point the

district court made. Although the plaintiffs are unable to participate in the "Rule-of-65 Retirement" pension benefits, "if it were not for PBGC taking over unsound plans, it is likely that they would not have received any benefits at all." Granted the plaintiffs wish to have their entire pension benefits today, but they should take some comfort in the fact that their benefits are secured for tomorrow.

III. Conclusion

After considering the plaintiffs' arguments, we find them to have no merit. The district court properly granted the Union's motion to dismiss and the PBGC's motion for summary judgment. Consequently, the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GERALD E. AILOR, WILLIAM E. BURNETTE, GARY P. BYERS, RALPH E. COX, ROBERT C. JACKSON, WILLIAM B. JEWELL, ARTHUR R. JOHNSON, CLARENCE E. MOORE, BILLIE R. OVERTON, LESTER R. PAYNE, RONALD L. POWELL, EDWARD L. REPPERT, and DENNIS R. WORKING,	)	CAUSE NO. IP-91-404-C
Plaintiffs,	)	
vs.	)	
THE PENSION BENEFIT GUARANTY CORPORATION,	)	
Defendant.	)	

JUDGMENT

The Court having this day filed its Entry in the above captioned matter in the following words and figures: (H.I.), now therefore in accordance therewith,

IT IS CONSIDERED AND ADJUDGED that plaintiffs take nothing by their

complaint against the Pension Benefit Guaranty Corporation.

Dated this 30th day of September, 1992.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GERALD E. AILOR, WILLIAM E. BURNETTE, GARY P. BYERS, RALPH E. COX, ROBERT C. JACKSON, WILLIAM B. JEWELL, ARTHUR R. JOHNSON, CLARENCE E. MOORE, BILLIE R. OVERTON, LESTER R. PAYNE, RONALD L. POWELL, EDWARD L. REPPERT, and DENNIS R. WORKING,	)	CAUSE NO. IP-91-404-C
PLaintiffs,	)	
vs	)	
THE PENSION BENEFIT GUARANTY CORPORATION,	)	
Defendant.	)	

ENTRY

This cause comes before the Court on the parties' cross-motions for summary judgment. For the following reasons the defendants Pension Benefit Guaranty Corporation's motion is granted and the plaintiffs' motion is denied.

Background

Plaintiffs are former employees of the Continental Steel Corporation (Continental) and past members of the United Steelworkers of America (Union). Defendant Pension Benefit Guaranty Corporation (PBGC) is a Congressionally established corporation, which seeks to prevent the forfeiture of employee retirement benefits. See 29 U.S.C. §1302.

In 1985, Continental filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. On February 12, 1986, PBGC initiated a proceeding in this Court under 29 U.S.C. §1342 to terminate and protect Continental's pension plans, it having been determined by PBGC that the plans did not meet minimum funding requirements. On February 19, 1986, we referred PBGC's action to the Bankruptcy Court for the Southern District of

Indiana where it became Adversary Proceeding No. 86-141.

On February 25, 1986, Continental's bankruptcy was converted from a reorganization arising under Chapter 11 of the Bankruptcy Code to a liquidation under Chapter 7. On March 12, 1986, PBGC, the Union, and the Bankruptcy Trustee approved the termination of Continental's retirement Plan A, and appointed PBGC statutory trustee over its funds. However, unresolved was the date of termination of Plan A. A settlement concerning this date between the Union, PBGC and Continental was approved by the Bankruptcy Court in 1988, thus concluding Adversary Proceeding No. 86-141. The settlement agreement established February 25, 1986, as the termination date of Plan A.

The plaintiffs were participants in Plan A and seek the so called Rule-of-65

pension provided for in §2.7 of that plan, which PBGC has denied. The present action commenced on April 16, 1991. The Union was dismissed from this suit on August 14, 1991, it being found that the plaintiff had failed to state a claim against the Union upon which relief could be granted.[1]

Discussion

Both PBGC and the plaintiffs have moved for summary judgment. Such judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.Pro. 56(c). While facts

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[1] Specifically, the plaintiffs' claim against the Union for breach of duty of fair representation was dismissed as it was raised outside the applicable limitations period. The plaintiffs' other claims were dismissed for failure to plead facts sufficient to show that a wrong was committed or for the plaintiffs failure to establish a link between the Union and the wrong claimed. See this Court's Entry dated August 14, 1991.

are viewed in the light most favorable to the nonmoving party, there is an affirmative burden of production on the nonmoving party to defeat a proper summary judgment motion. Baucher v. Eastern Indiana Production Credit Association, 906 F.2d 332, 334 (7th Cir. 1990) (following Celotex Corp. v. Catrett 447 U.S. 317, 323-24 (1986)). Before the Court denies summary judgment, it must be determined whether there is sufficient evidence for a jury to find a verdict in favor of the nonmoving party. Id. (following Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, (1986).

The plaintiffs claim that they were wrongfully being denied Rule-of-65 pensions. To qualify for such a pension, the plaintiffs must satisfy the following provision:

> Any participant (i) who shall have had at least 20 years of continuous service as of his last day worked, (ii) who has not attained the age

> the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 or more but less than 80, ... shall be eligible to retire, and shall upon his retirement be eligible for a pension ...

PLan A §2.7.

The plaintiffs do not dispute that as of their last working day, the day Plan A was terminated, none of them had the requisite number of years of service to qualify for a Rule-of-65 pension. However, plaintiffs argue that under §5.1 (a)(1) of Plan A, i.e., Plan A's creep provision, in connection with §10.8 of Plan A, Plan A's shutdown provision, they are entitled to add up to 2 years to the length of their continuous service.[2] If these years are added to the plaintiffs' service record, many, if not all, of the plaintiffs qualify for Rule-of-65 pensions.

The Rule-of-65 pension provided for in §2.7 of Plan A is a pension benefit as

defined in 29 C.F.R. §2613.2. However, it is nonforfeitable benefit as defined in 29 C.F.R. §2613.6(a) only if "on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under provisions of the plan to establish entitlement to the benefit .."

In addition, it is clear that when a pension plan terminates, the accrual of credited service ceases. In re Pension Plan for Employees of Broadway Maintenance Corporation, 707 F.2d 647,

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[2] Section 10.8 of Plan A, entitled "Special Provision-Shutdown" provides that "if the Basic Agreement does not grant a participant the right to elect to be placed on layoff at the time of permanent shutdown of the plant ... such participant ... shall be deemed to have the ... right to elect to be laid off .." Section 5.1(a)(1) of Plan A provides in relevant part that: "in determining length of continuous service for pension purposes: (1) that portion of any absence which continues beyond two years from commencement of absence due to layoff of physical disability shall not be creditable as continuous service."

649 (2nd Cir. 1983); Hackett v. Pension Benefit Guaranty Corporation, 486 F.Supp. 1357, 1366 (D.Md. 1980); 29 C.F.R §2613.5 (a)(3) (conditions must be satisfied "before the date of plan termination.") Thus, the real issue is whether the plaintiffs earned their Rule-of-65 pension before the termination of Plan A.

The plaintiffs are in essence contending that under Plan A they were entitled to claim two additional years immediately upon termination. PBGC asserts in opposition that the plaintiffs do not earn service years until after they have undergone a period of layoff, which period occurred after the termination of Plan A. Thus, PBGC contends that regardless of whether plaintiffs were allowed to elect layoff status for two years, or even if plaintiffs had continued to work for Continental, they are not entitled to receive any credited service under Plan A

after its termination date.[3]

After careful consideration, we find that the plaintiffs are not -entitled to Rule-of-65 pensions. Neither §10.8 nor §5.1 of Plan A provides for the immediate credit of two years service. In fact, the phrase "any absence which continues" in §5.1 of Plan A indicates that this credit is not to be granted until the layoff has occurred. However, any creditable layoff occurred after the termination of Plan A. Since the termination of Plan A terminated any accrual of service, PBGC's

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[3] We note, however, that PBGC states that "[each of the Plaintiffs are entitled to receive a Deferred Vested Pension pursuant to Plan A Section 2.8. This type of benefit is paid when a Plan A participant, having accrued at least 10 years of continuous service, reached his or her normal retirement age, which, under Plan A, is 65 years. See Plan A Section 2.1. If a Plan A participant who is entitled to a Deferred Vested Pension chooses to retire before age 65, his or her pension payment will be reduced pursuant to Plan A Section 3.3(d)(2) and (d)(3)."

motion for summary judgment must be granted. Accordingly, the plaintiffs' motion is denied.

The plaintiffs spend much space briefing whether they received notice of Plan A's termination. However it is clear that the plaintiffs admit that they were members of the Union, and that the Union represented these employees in the shutdown of Continental and the termination of Plan A. Thus, the plaintiffs cannot argue, years after the fact, that they did not receive at least constructive notice of Plan A's termination.[4]

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[4] Indeed, PBGC notes in its briefs that Continental and the Union received notice, and that notice was published in the Indianapolis and Kokomo papers. While the plaintiffs may not be happy with their Union's representation, the plaintiffs are wise to consult Rule 11, Fed.R.Civ.Pro., prior to making any allegations that they did not receive notice of the termination of Plan A.

The plaintiffs also argue that Ooley v. Schwitzer Div. Household Mfg. Inc., 961 F.2d 1293 (7th Cir. 1992) is applicable to the present facts. However, we agree with PBGC that Ooley is distinguishable in that the pension plan in Ooley remained ongoing after the plant had shutdown. Here, Continental's Plan A was terminated on the day of shutdown by PBGC for its being unsound. The plaintiffs other arguments similarly miss the mark and need not be addressed.

It is unfortunate that employees such as the plaintiffs are not able to creep into Rule-of-65 pension after their retirement plans are terminated by the PBGC. However, it must be noted that if it were not for the PBGC taking over the unsound plans, it is likely that they would not have received any benefits at all.

Dated this 30th day of September, 1992.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GERALD E. AILOR, WILLIAM E. BURNETTE, GARY P. BYERS, RALPH E. COX, ROBERT C. JACKSON, CLARENCE E. MOORE, BILLIE R. OVERTON, LESTER R. PAYNE, RONALD L. POWELL, EDWARD L. REPPERT, and DENNIS R. WORKING,	)	CAUSE NO. IP-91-404-C
Plaintiffs,	)	
vs	)	
UNITED STEELWORKERS OF AMERICA, and THE PENSION BENEFIT GUARANTY CORPORATION,	)	
Defendants.	)	

ENTRY

This cause comes before the Court on the plaintiffs' motion to amend or alter this Court's Entry of August 14, 1991, and on the plaintiffs' "supplemental motion for leave to amend complaint". For the following reasons, both motions are denied.

In our August 14, 1991, Entry we granted the defendant United Steelworkers of America's (Union) motion to dismiss. We held that "to the extent that the plaintiffs are asserting a claim for a breach of duty of fair representation, it is dismissed for being outside the six months statute of limitations" for such claims. As to the plaintiffs' claim under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §101 et. seq., we found that the plaintiffs did not state a claim upon which relief could be granted.

The plaintiffs now request leave to file an amended complaint. However, upon review of the proposed complaint, we agree with the Union that it merely repeats the arguments made in the original complaint, with an added emphasis on a claim for a breach of the duty of fair representation. The Union is

alleged to have misrepresented the plaintiffs' interests in Continental Steel Company's bankruptcy proceedings. However, the events complained of, i.e., the Union's settlement with the Pension Benefit Guaranty Corporation, all occurred well outside the limitations period for such claims, notwithstanding the plaintiffs' attempt to circumvent this problem by alleging that "by virtue of the Union's Motion to Dismiss and subsequent filings in this action [meaning this action], the Union has arbitrarily and capriciously breached duties to Plaintiffs to fairly represent plaintiffs."

The plaintiffs may at one time have had a claim against the Union, or they may not have. We will never know. The events giving rise to such a claim have long since passed and a complaint arising out of them is now untimely. Therefore, for

all of the above reasons, the plaintiffs' motion to alter or amend is denied.

Dated this 8th day of October, 1991.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GERALD E. AILOR, WILLIAM E. BURNETTE, GARY P. BYERS, RALPH E. COX, ROBERT C. JACKSON, WILLIAM B. JEWELL, ARTHUR R. JOHNSON, CLARENCE E. MOORE, BILLIE R. OVERTON, LESTER R. PAYNE, RONALD L. POWELL, EDWARD L. REPPERT, and DENNIS R. WORKING,	)	CAUSE NO. IP-91-404-C
Plaintiffs,	)	
vs	)	
UNITED STEELWORKERS OF AMERICA, and THE PENSION BENEFIT GUARANTY CORPORATION,	)	
Defendants.	)	

ENTRY

This cause comes before the Court on defendant United Steelworkers of America's motion to dismiss for failure to state a claim. For the following reasons the motion is granted.

Background

In 1985, Continental Steel Corporation (Continental) filed for bankruptcy under Chapter 11 of the Bankruptcy Code. This filing was later converted to a Chapter 7 proceeding. Defendant Pension Benefit Guaranty Corporation (PBGC) is a Congressionally established corporation, which, among other duties, seeks to prevent the inequitable forfeiture of benefits. See 29 U.S.C. §1302.

In 1986, PBGC initiated a proceeding in this Court under 29 U.S.C. §1342 to terminate and protect Continental's pension plans. That action was referred to the Bankruptcy Court for the Southern District of Indiana and assigned Adversary Proceeding No. 86-141. Defendant United Steelworkers of America (Union) intervened on behalf of all individual plan participants. A settlement agreement was approved by the

Bankruptcy Court in 1988. The agreement finally set the termination dates of the plans and appointed PBGC to act as trustee for the administration of the plans and the payment of benefits.

The plaintiffs allege that they were employed by Continental and are members of the Union. Just what the plaintiffs are claiming against the Union is not clear. In paragraph 26 of the complaint, seemingly the only paragraph alleging wrongdoing by the Union, it is claimed that "by virtue of the failure of the Union to enforce the collective bargaining agreements while purportedly representing Plaintiffs, ... the Plaintiffs were deprived of the right to 'creep' into eligibility for guaranteed pension as a right vested upon the event of 'layoff' ..."

However, in their brief in opposition to dismissal the plaintiffs state the following:

> As the Union points out, there is no allegation made in Plaintiffs Complaint of wrongdoing by the Union. [Reply Memorandum, at page 1] This is correct. That is because this is not an action for breach of duty by the Union. This is an equitable action to enforce the Union's duty to represent plaintiffs as "exclusive bargaining agent" for their rights in this matter, 29 U.S.C. §1132(a)(3) or at least "clarify" Plaintiffs rights in this matter 29 U.S.C. §1132(a)(1).

Just what the plaintiffs are seeking is made more mysterious by the plaintiffs' demand, here in full:

> WHEREFORE, the Plaintiffs pray for relief as follows:
> (1) That the Plaintiffs be granted their vested right to guaranteed pensions pursuant to the Rule-of-65 by the PBGC retroactive to the date of their respective qualifying eligibility or, in the alternative, damages upon breach of duty of the Union to fairly represent Plaintiffs and punitive damages if warranted.
> (2) Reasonable attorney's fees pursuant to statute.
> (3) Such other and further relief as proper in the premises.

The Union has moved for dismissal pursuant to Rule 12(b)(6), Fed.R.Civ.P., for the plaintiffs failure to state a

claim upon which relief may be granted.

Discussion

The test for dismissal under Rule 12(b)(6) is "whether it appears beyond doubt that the plaintiffs can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 88, 102. 2 L.Ed.2d 80, 94, (1957). In addition, the factual allegations of the complaint are to be taken as true and "the complaint is to be liberally construed in favor of the plaintiff." Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404, 416-17 (1969); First Interstate Bank of Nevada v. Chapman, 837 F.2d 775, 776 (7th Cir. 1988).

The Union asserts that "[t]he only shred of a claim against the Union adumbrated in the Complaint is the contention that the Union failed to enforce the contract back in 1988; but if

this is anything, this is a claim for breach of duty of fair representation, and is time-barred on the face of the complaint."

We agree, to the extent that the plaintiffs are asserting a claim for breach of duty of fair representation, it is dismissed for being brought outside the six month statute of limitations imposed by DelCostello v. Teamsters, 462 U.S. 151 (1983) on claims arising under 29 U.S.C. §160. The activities in question took place early in 1988, and no claim for tolling has been made.

However, as noted above, the plaintiffs are vaguely arguing that theirs is an equitable claim against the Union made pursuant to 29 U.S.C. §1132(a)(3) and 29 U.S.C. §1132(a)(1).

29 U.S.C. §1132(a)(1) and (3) provide the following:

(a) Persons empowered to bring a civil action

> (1) by a participant or beneficiary - (A) for the relief provided in subsection (c) of this section [providing for information], or under the terms of his plan, to enforce his right under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

After careful review of the Complaint, we find that no claim for relief under these sections has been made. As to §1132 (a)(1), the plaintiffs have failed to state what terms of the plan or agreement, if any, have been violated by the Union. The Union is not the administrator of Continental's retirement plans. Indeed, as noted above, the

plaintiffs concede in their brief that there is no allegation of wrongdoing made against the Union. Likewise, no claim has been stated under §1132(a)(3) since no act or practice linked to a violation of 29 U.S.C. §101 et seq. has been alleged.

A Complaint must set forth a claim for relief and must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R.Civ.Pro. 8. "No claim for relief is stated if the complaint pleads facts insufficient to show that a legal wrong has been committed, or omits an averment necessary to establish the wrong or fails so to link the parties with the wrong as to entitle the plaintiffs to redress." Sutton v. Easter Viavi Co, 138 F.2d 959, 960 (7th Cir. 1943). In the present action, the plaintiffs have failed to satisfy these standards. Therefore, for all of the above reasons, the Union's

motion to dismiss is granted.

Dated this 14 day of August, 1991.

Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006-1860

Aug. 17, 1993

Phil Kauble, Spokesman
Pension Rights Committee
1024 South McCann Street
Kokomo, Indiana 46902

Re: Continental Steel Corporation;
Pension Plan A

Dear Mr. Kauble,

I write in response to your letter dated July 20, 1993, which was referred to my office by the U.S. Department of Labor. You asked for the PBGC to

> provide the statutory authority for PBGC to negotiate [your] ERISA-based claims and rights with the Union [United Steelworkers of America] who had no powers of attorney as it asserted as its authority to negotiate and make settlement agreement [] in the pension litigation with PBGC.

You refer to Bankruptcy Rule 9010 as establishing that the Union's authority to represent you must have been evidenced by a power of attorney executed by you. However, Rule 9010 is applicable to representation of creditors and parties in bankruptcy proceedings. The negotiations to which you refer were negotiations between the PBGC and the parties to the pension contract, namely, Continental Steel Corporation ("Continental") and the Union. The sole subject of these negotiations was the

establishment of a date of termination for the Continental Steel Corporation 1950 Employee Pension Plan A ("PLan A"). The Union was representing the Plan in these negotiations.

The Union was not required to produce powers of attorney evidencing representation of former Continental employees in order to participate in the negotiations regarding the date of Plan termination. The Union was entitled to negotiate on behalf of the Plan toward an agreement regarding the date of Plan termination.

I trust this response has been of assistance to you.

Sincerely,

By: Carol Conner Flowe/WB
General Counsel

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

October 12, 1993

Re: United Steelworkers of America (Continental Steel Corporation)
Case No. 25-CB-7306

Mr. Phillip L. Kauble
1024 South McCann Street
Kokomo, IN 46902

Dear Mr. Kauble,

This is in reply to your motion for reconsideration of our September 8, 1993, decision sustaining the Acting Regional Director's June 30, 1993 refusal to issue complaint in the above-captioned case.

Upon a de novo review of the investigative file in light of the contentions raised by the motion, it was concluded that a departure from our original decision would be unwarranted.

In your motion, you allege that certain statements contained within the documentation of an administrative agency and of a Bankruptcy Court is evidence that the Charging Parties, who are retirees of the Employer, are statutory employees under Section 2(3) of the National Labor Relations Act, and therefore have standing to assert that the Union has violated Section 8(b)(1)(A) of the Act by failing to fairly represent them.

As set forth in Allied Chemical & Alkali Workers of America, Local Union No 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971), in which the Supreme Court stated that "in addition to holding that pensioners are not 'employees' within the meaning of the collective-bargaining obligations of the Act, we hold that they were not and could not be 'employees' included in the bargaining unit" it must be concluded that the Charging Parties are not statutory employees under Section 2(3) of the Act, and the fact that the Union had settled certain pension benefit issues in the context of the Employer's bankrupt status would not warrant a finding that the Union was then obligated under the National Labor Relations Act to represent or negotiate on behalf of retired persons. In these circumstances we have no choice but to deny your motion and consider this case closed.

Sincerely yours,

Jerry M. Hunter
General Counsel

By: _____
Nicholas E. Karatinos
Acting Assoc. Gen.
Counsel
Office of Appeals